88-205

No. —

In The

Supreme Court of the United States

October Term, 1987

DOYLE E. CAMPBELL,
DOYLE E. CAMPBELL, M.D., INC., AN
OHIO CORPORATION
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Should the ruling of this Court in *Huddleston v. U.S.*, ___ U.S. ___, 108 S.Ct. 226 (1988), establishing the standard for the admission of "other acts" under Federal Rule of Evidence 404(b), be applied retroactively?

2. Whether the use of video taped depositions in a criminal trial violate the defendant's Sixth Amendment Constitutional right to confront and cross examine the witnesses against him when the government fails to establish that the witnesses are unavailable for trial and when the government fails to establish compliance with Federal Criminal Rule of Procedure 15?

3. Does the Fourteenth Amendment constitutional due process right to a fair trial limit the admissibility of evidence extrinsic to the indictment when the evidence is purportedly offered pursuant to Federal Rule of Evidence 404(b)?

4. Whether, under the analysis of *McNally v. United States*, 483 U.S. ___, Congress intended the "mail fraud" statute to apply to the prosecution of a physician who administers a recognized form of treatment for a patient's medical condition?

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REFERENCE TO THE CASE IN THE COURTS BELOW

1. Trial Court: *United States of America v. Doyle E. Campbell and Doyle E. Campbell, M.D., Inc.* (March 2, 1987), United States District for The Southern District of Ohio, Western Division, Case No. CR-1-86-126, unreported.

2. Court of Appeals: *United States of America v. Doyle E. Campbell and Doyle E. Campbell, M.D., Inc.* ___F.2d.___ (April 12, 1988 6th Cir. Recommended for full-text publication).

JURISDICTIONAL STATEMENT

The Petitioners in this case were charged in a multi-count indictment with allegedly filing false claims in violation of 18 U.S.C. §287, and for mail fraud in violation of 18 U.S.C. §1341, in billing the government for medical treatment provided to medicare patients. The government alleged the treatments were unnecessary. The case was tried in the United States District Court of Ohio, Southern District, Western Division. On March 2, 1987, the jury found the Petitioners guilty of 52 counts and not guilty on 20 counts.

On May 6, 1987, Petitioner, Dr. Doyle E. Campbell, was sentenced to 14 months imprisonment on each count to run concurrent with each other and was fined $75,400.00. The corporate petitioner received the same fine.

The Petitioners timely appealed the convictions to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit, in a 2-1 decision, affirmed the Petitioners' convictions in an opinion recommended for full text publication filed on April 12, 1988.

On April 25, 1988, the Petitioners filed a Petition for a rehearing en banc. On May 25, 1988, the Court of Appeals denied the petition.

The Petitioners invoke the jurisdiction of this Court pursurant to 28 U.S.C. §1254 (1), and Rule 20 of the Rules of the Supreme Court of the United States.

28 U.S.C. §1254 (1) verbatim provides

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

CONSTITUTIONAL PROVISIONS AND STATUTORY AUTHORITY RELEVANT TO THE CASE

1. 18 U.S.C. §287

2. 18 U.S.C. §1341

3. Fourteenth Amendment, United States Constitution
4. Sixth Amendment, United States Constitution
5. Federal Criminal Rule of Procedure 15
6. Federal Rule of Evidence 404(b)
7. Federal Rule of Evidence 804(a)(4)
8. Federal Civil Rule of Procedure 30

STATEMENT OF THE CASE

The case originated in the United States District Court for the Southern District of Ohio for the Western Division.

Dr. Doyle E. Campbell and Dr. Doyle E. Campbell, M.D., Inc. were indicted in January, 1987, in a multi-count indictment alleging mail fraud in violation of 18 U.S.C. §1341, and alleging false statements to the government, in violation of 18 U.S.C. §287. Dr. Campbell and his corporation were charged with 144 individual counts. The indictment did not allege a conspiracy.

The indictment and evidence at trial essentially charged the defendants with allegedly performing glaucoma laser procedures known as "ALT" procedures, when other forms of treatment were available. The defendants billed the federal government through Nationwide Insurance Co. and were paid for laser treatments performed. All laser procedures were, in fact, performed. The government's case alleged that the treatments rendered were not medically necessary and appropriate.

Prior to the trial, the prosecution requested that the Court issue an order allowing some witnesses to testify by way of deposition in lieu of their personal appearances at trial. The trial court issued the requested order on the basis that the witnesses were elderly (averaging 68 to 70 years of age), hard of hearing, in ill health and generally infirm. The government sua sponte altered the Court's order by using video equipment and took depositions of several witnesses not included in the order.

Defense counsel objected to the taking of the depositions and specifically stated in the depositions the following:

> Since this is a criminal procedure and the record should reflect that the defendant, Dr. Campbell, and the corporation are present. Since this is a criminal procedure, it should reflect the defendant on this deposition or any other, does not waive any of the requirements of form with regard to formality or authentication.

After noting that the prosecution failed to comply with Federal Criminal Rule 15 with respect to the depositions, the trial court reluctantly permitted the use of the depositions at trial. The Court, in permitting the use of the depositions, indicated that the prosecution should be prepared to defend the use of the depositions in the Court of Appeals, and further stated that he would never again permit the use of such depositions without full compliance with Federal Criminal Rule 15. The trial court did not make a finding that the witnesses were unavailable.

Over objection, the trial court permitted the testimony of two alleged victims of fraud on the part of Dr. Campbell that did not relate to any count in the indictment. Witnesses, Mary Newton and Jessie Gammon, both testified by means of videotaped deposition. The indictment contained no allegations concerning either of these patients. The testimony of both patients was highly prejudicial. Mrs. Gammon and Mrs. Newton were the only patients who testified that no procedure was performed. Further, Mrs. Gammon was permitted to testify that she could not obtain her medical records from the petitioner. Judge Martin, Jr., in his dissent in the Court of Appeals, found their testimony to be "irrelevant" and "highly prejudicial".

The case was tried from February 23, 1987 through March 4, 1987. Seventy-two counts of mail fraud and false claims were submitted to the jury as to each Petitioner. The jury, after lengthy deliberations, found each Petitioner guilty of fifty-two (52) counts, involving twenty-five (25) patients, and not guilty on twenty (20) counts involving eleven (11) patients.

Dr. Campbell was permitted to remain free on bond pending this appeal. A pre-sentence report was prepared and submitted to the court. The Petitioner had no prior criminal record. The Court, on May 6, 1987, sentenced the Petitioner, Doyle Campbell, to fourteen (14) months imprisonment on each count to run concurrent with each other, and the corporate Petitioner was fined $75,400.00

The case was timely appealed to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals, in a sharply divided opinion, (Judge Martin, Jr. dissenting) affirmed the convictions of the Petitioners. The Court of Appeals ruled that the presentation of the videotaped depositions was error, but ruled the error was harmless. The majority also ruled that the admission of the "other acts" testimony was proper under Federal Rule of Evidence 404(b). The dissent would have granted a new trial on the basis that the "other acts" testimony was improperly admitted and highly prejudicial. Three weeks after the Court of Appeals decision was filed, this Court, in *Huddleston v. United States*, ___ U.S., ___ 108 S.Ct. 226 (1988) established the standard for determining the admissibility of "other acts" evidence. This test was not the test used by the Court of Appeals.

The Petitioners filed a petition for a rehearing en banc which was denied on May 25, 1988. This petition was then timely perfected.

A statement of the pertinent facts material to the consideration of the questions presented will be necessary.

Dr. Doyle Campbell is an ophthalmologist, age 53, who operates an office in Portsmouth, Ohio and Ironton, Ohio. He graduated from medical school in 1964 and spent his residency at the United States Navy Hospital, in Bethesda, Maryland. He retired from the United States Navy in 1971 and began practicing ophthalmology in Portsmouth, Ohio. Prior to this case, Dr. Campbell had no criminal record of any sort.

In the course of his practice, Dr. Campbell treated many elderly patients. Many of these patients had multiple medical problems including hearing problems, memory problems, diabetes, eye diseases, and the patients were generally infirm. Many of these patients had glaucoma. Glaucoma is elevated internal pressure in an eye which can permanently damage vision or cause blindness.

Dr. Campbell, in August, 1983, installed an Argon laser machine in his office and began treating patients. Through the use of laser energy, the machine places small burns upon the trabecular meshwork which is the "drain" in the eye permitting fluid to leave the eye. This technique, called Argon Laser Trabeculoplasty or "ALT", is used to help lower the internal

eye pressure which, if high enough, causes permanent damage including blindness. The "ALT" procedure corrects the glaucoma condition itself rather than merely treating its symptoms.

The laser technique was developed in the later 1970's. Because the laser does not break the surface of the skin, the procedure is considered non-invasive. Prior to the availability of the "ALT", pressure could be reduced in the eye only by medication which caused side effects, or by actual microsurgery on the eye itself.

One of the major issues in the case was whether or not Dr. Campbell's patients had glaucoma. The definition of glaucoma varies in the medical community. Many physicians define glaucoma as a condition where the internal pressure of the fluid in the eye is elevated to the extent that it threatens damage to the optic nerve causing permanent vision loss. Dr. James Andrew, a Board Certified Ophthalmologist and Professor of Ophthalmology at Ohio State University, testified that there is no fixed pattern to the disease of glaucoma, and that many physicians in the medical community will diagnose an elevated eye pressure as glaucoma, where others might diagnose a condition as glaucoma, only if the optic nerve has actually suffered damage causing irreversible vision loss. The government's expert, Dr. Zalta, testified that glaucoma was a condition of elevated eye pressure that caused actual optic nerve damage with vision loss.

The distinction in the definition is important with regard to a physician's philosophical approach to treatment. Many physicians feel it is appropriate to treat glaucoma or elevated pressure prior to actual nerve damage because once there is actual optic nerve damage caused by the high pressure, there is irreversible vision loss. The method of treatment for glaucoma or elevated pressure varies with respect to the individual being treated. Many physicians treat glaucoma patients with various medications or eye drops that help reduce the eye pressure. The effect is only temporary in nature, and the drops must be taken daily in the prescribed doses. If the medication is not taken, the eye pressure will again return to an elevated state. Many elderly patients forget or refuse to take their glaucoma medication, or suffer undesirable side effects from the medication. If utilized

at low power with 25 or less applications, the laser has almost no side effects. Further, the therapeutic benefit from the use of the laser is permanent, and the eye pressure is usually permanently lowered.

The laser has a blue aiming light, and when the laser is actually applied, an orange light is emitted. The laser has various power settings from 0 to over a 1000 milliwatts. To perform the "ALT" procedure, the patient is seated in a chair, eye drops numbing the eye are applied, and the gonio lens is filled with a lubricating gel and placed against the eyeball. An assistant holds the patient's head steady because it is crucial that the laser beam be applied to the exact spot desired. Movement by the patient can cause the beam to be applied in the wrong position. The desired power setting is set, and the laser beam is activated by pushing a foot pedal which causes a clicking noise. The beam is then shot into the eye for .1 of a second. The procedure takes from 7 to 15 minutes to perform. The patient feels little or no pain.

When the laser was first introduced as an alternative treatment in the 1970's, the medical community felt that the appropriate power setting was from 600 to 1000 milliwatts with one hundred applications around 360° of the eye. However, studies conducted in the early 1980's indicated that the above parameters were actually too many applications at too high a power setting. With the above parameters, some patients were, experiencing an increase in elevation of their eye pressure. Physicians, therefore, began to reduce the power settings from 1000 to 400 to 600 milliwatts and reduced the number of applications to 25 to 50 over a 180° angle of the eye, achieving the desired pressure reduction and greatly reducing the risks of the laser procedure.

Dr. Campbell utilized 300 milliwatts over 90° angle in the treated eye and found that he achieved the desired pressure reduction and had no adverse side effects.

Studies in Egypt and other countries demonstrated that the laser was an effective and desirable form of *initial* treatment for glaucoma as opposed to initial medication.

At the time of trial, a multicenter study was being conducted throughout the United States to determine whether ini-

tial treatment by "ALT" was, in fact, more effective than treatment by medication of glaucoma patients. Dr. Weber, a government witness, is a participant in that study, but the results will not be released for several years.

At trial, the government initially took the position that the laser procedure was not actually performed on the thirty-six (36) patients, forming the basis for the indictment. However, the evidence, including testimony of an office assistant called as a government witness, unequivocally established that Dr. Campbell actually performed the "ALT" on all thirty-six (36) patients, and that no false entries were placed in the patient charts.

The government's own expert witness, Dr. Zalta, testified on cross examination, that he could *not* testify that the laser procedure was not performed on the thirty-six (36) patients.

Therefore, the prosecution changed tactics, and took the position that the laser treatment was unnecessary, i.e. not an appropriate form of treatment, and that the billings for the procedure were criminal acts. Dr. Zalta testified that he did not examine *any* of the thirty-six patients involved, but had merely reviewed their medical charts from Dr. Campbell's office. Dr. Zalta, by *his* definition of glaucoma, which required actual nerve damage and vision loss, testified that he felt seven (7) of the thirty-six (36) patients had glaucoma. All thirty-six patients had documented pressure elevation in the eyes lasered.

In addition, Dr. Weber, a government witness, testified that he treated eight of the thirty-six patients and found evidence of laser burns in one of the patients. However, Dr. Weber admitted that you cannot see evidence of a laser burn in the eye of a patient who had a previous laser treatment from 50% to 88% of the time. Dr. Weber further acknowledged that all eight patients he treated had glaucoma or pre-glaucoma conditions and, in fact, he performed the "ALT" procedure on several of the patients' other eye.

Dr. Zalta also testified that of all his patients with glaucoma, over ⅓ of them would eventually require laser treatment. The government's experts, Dr. Zalta and Dr. Weber, testified that the initial treatment for glaucoma should be medication. However, both of them admitted that the medicine had a number of side effects which were undesirable, including

blurred vision, respiratory problems, tingling in the fingers, lethargy, slower heartbeat, and stomach problems. Because of the side effects, because a number of elderly patients refuse to take their medications, and because a number of his patients had conditions which indicated medication was inappropriate, Dr. Campbell performed the "ALT" procedure as an initial form of treatment on some of his patients.

All experts, even those testifying for the government, testified that there was a body of opinion in the medical community that laser treatment could be used as the primary or initial form of treatment for glaucoma. The testimony was undisputed that laser treatment as a form of *initial* treatment was considered appropriate by a number of physicians in the medical community, and was the basis for a current nationwide study. The testimony was also undisputed that the individual treatment for glaucoma had to be tailored to the individual patient. All the experts agreed that the laser treatment achieved the same therapeutic benefit as the medications, i.e. it reduced the pressure of the eye.

Dr. Zalta and Dr. Weber also agreed that the laser treatment is a permanent solution to reducing the pressure where medication is only temporary. Dr. Andrew testified for the defense that the number of applications and whether to laser an eye were matters of medical judgment and opinion. Dr. Andrew also testified that the definition of glaucoma, i.e. elevated pressure which *causes* nerve damage vs. elevated pressure that *threatens* to cause nerve damage, was a matter of legitimate difference of medical opinion.

Having treated all thirty-six individual patients and knowing their individual health problems, Dr. Campbell decided to treat the elevated pressures of these patients by way of laser treatment. Dr. Campbell carefully went through the charts and medical history of all thirty-six patients and indicated why he performed a laser treatment in each case. In every case where the laser was applied, the patient's eye pressure dropped to levels considered safe. The laser accomplished the same therapeutic benefits that the medications would have accomplished.

After lengthy deliberations, the jury found the defendants guilty as indicated. These are the facts material to the questions presented.

AGRUMENT IN SUPPORT OF PETITION

FIRST QUESTION PRESENTED FOR REVIEW

Should the ruling of this Court in Huddleston v. U.S., ___ U.S. ___, 108 S. Ct. 226 (1988), establishing the standard for the admission of "other acts" under Federal Rule of Evidence 404(b), be applied retroactively?

The Court of Appeals did not apply the test established by this Court in *Huddleston v. United States, ___ U.S. ___, 108 S.Ct. 226 (1988) for the admissibility of "other acts" evidence under Federal Rule of Evidence 404(b). (See Campbell* opinion Appendix p. 1). A majority of the Court of Appeals instead applied the following two-part test:

> First, we must decide whether the evidence was admissible for any *proper* purpose, as distinct from the *improper* purpose of showing "character" or "propensity". If we conclude there was a proper basis for admission, we must then consider whether the probative value of the evidence outweighed its potential prejudicial effects.

(See majority opinion *United States v. Campbell,* ___F.2d ___, (1988) p. 15 at Appendix p. 15).

The majority then concluded that the testimony of Mrs. Newton and Mrs. Gammon was admissible for the purpose of showing Dr. Campbell's "intent" and the probative value of the evidence outweighed any prejudicial effect.

The dissent, written by Judge Martin, Jr., pointed out the fallacy of the reasoning of the majority:

> I do not see how the testimony of Mary Newton or Jessie Gammon can be admitted within the requirements of Rule 404(b). Mrs. Newton, who was not listed in the indictment as having been defrauded, testified at trial that the defendant did not perform any laser treatments on her and that the first time she knew she had received a laser treatment was when she received a $900 bill in the mail. She also testified that she complained about the bill and that the defendant then cut the bill in one-half. This testimony has no relevance to the question of whether the defendant

possessed the intent necessary to be convicted of defrauding Medicare and the individuals listed in the indictment. It appears clear that the purpose of this testimony was to introduce evidence from which the jury could infer that the defendant was guilty of bad acts.

Mrs. Gammon, a second patient of the defendant not listed in the indictment, testified to the effect that the defendant did not use a "gonio lens" which is necessary to perform laser treatments. She was the only patient to allege that no lens was used. She was also allowed to testify that when she requested her charts from the defendant they could not be found and that she never did receive her medical records from the defendant. She was the only patient to testify that she could not obtain her records. Like the testimony of Mrs. Newton, this testimony has no relevance to the counts charged in the indictment. Because of the importance of the testimony of these two witnesses, owing to its uniqueness and dissimilarity from the other evidence in this case, I would find that the district court abused its discretion in admitting the extrinsic testimony of Gammon and Newton in contravention of Rule 404(b).

The majority indicates that it believes that the evidence is admissible for the purpose of showing "intent". The trial court indicated, at pages 297 and 298 of the transcript, that it was admitting the testimony of these two witnesses because it helped show "knowledge". It must be remembered, however, that "intent" and "knowledge" should not be analyzed in a vacuum but with respect to the crimes alleged to have been committed by the defendant in the indictment. The indictment indicates the identity of the defendant's patients alleged to have been defrauded and how the defendant, as part of that scheme, also defrauded the Department of Health and Human Services. Nowhere in the indictment is Mary Newton or Jessie Gammon identified. Thus, even if the defendant intended to defraud Newton and Gammon, I do not see how this is relevant to the government's allegations that the doctor intentionally

defrauded Medicare and those patients identified in the indictment. The role that Newton's and Gammon's testimony played in convicting defendant cannot be minimized. In a colloquy with the trial court, the government's attorney admitted that Newton's testimony was critical because she was "the only witness...that can testify that she personally was defrauded of money because she had to pay the bill herself." Indeed, Mrs. Newton was not a Medicare patient and was the only patient who testified that no surgical procedure was performed. All the patients listed in the indictment were Medicare patients and none of them testified that no laser procedure was performed. I believe the testimony of Mrs. Newton had nothing to do with the other counts in the indictment, and that it was, undoubtedly, highly prejudicial.

The extrinsic offense evidence admitted here for the alleged purpose of showing intent is nothing more than an elaborate cloak behind which bad character evidence may be slyly admitted. The evidence admitted here in the name of intent is relevant only to the extent that it creates an inference that the defendant has a propensity for defrauding and mistreating patients. It does not have any independent relevance on the question of the defendant's intent. The danger that has manifested itself here is one inherent in most bootstrapping efforts. By looking to extrinsic offenses, prosecutors will be able to reinforce otherwise unprovable charged offenses by way of inferences generated from acts themselves not provable.

We must be vigilant in our watch over the values secured by Rule 404(b), which assures criminal defendants that they will be fairly tried on the basis of their actions alleged in the indictment. Due process demands no less.

In *Huddleston,* cited supra, this Court, on May 2, 1988, established the following test for admissibility of "other acts" evidence:

Evidence is admissible under Rule 404(b) only if it is relevant. "Relevancy is not an inherent characteristic of any

item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Advisory Committee's Notes on Fed. Rule Evid. 401. 28 U.S.C. App., p. 688. In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor.

* * *

The Court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact.

* * *

We share petitioner's concern that unduly prejudicial evidence might be introduced under Rule 404(b). See *Michelson v. United States,* 335 U.S. 469, 475-476 (1948). We think, however, that the protection against such unfair prejudice emanates not from a requirement of a preliminary finding by the trial court, but rather from four other sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402—as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice. See Advisory Committee's Notes on Fed. Rule Evid. 404(b), 28 U.S.C. App. p. 691; S. Rep. No. 93-1277, at 25; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted. See *United States v. Ingraham,* 832 F.2d 229, 235 (CA1 1987).

(*Huddleston,* cited supra.)

In the case sub judice, the trial court and the majority of the Court of Appeals failed to find that the jury could reasonably

conclude that Dr. Campbell committed the acts alleged by Mrs. Gammon and Mrs. Newton; the majority also failed to find that the testimony was relevant to any issue "properly provable" in the case. Had the majority applied the test established in *Huddleston,* supra, the result could have been different. The dissenting opinion correctly applied the standards set forth in *Huddleston,* supra, and correctly reasoned that a new trial was warranted.

An independent reason also exists for granting the petition in this case. The majority decision in this case conflicts with a decision within the Sixth Circuit itself. See *United States v. Ebens* 800 F.2d 1422 (CA6 1986). In *Ebens* the defendant was charged with violating the civil rights of a minority group. The prosecution introduced evidence of the defendant's alleged racial slurs unrelated to counts in the indictment relying on Federal Rule of Evidence 404(b). The Court of Appeals reversed the defendant's conviction holding that the evidence was improperly admitted. Finally, the majority in Dr. Campbell's case curiously rely on the reasoning of *United States v. Vincent,* 681 F.2d 462 (CA6 1982) in allowing the "other acts" testimony. The *Vincent* decision was written by the *dissenting* Judge in Dr. Campbell's case, Judge Boyce F. Martin, Jr. This Court should grant this petition in order to resolve the conflict.

This Court, should therefore, grant this petition and permit full briefing of this issue and the other questions presented. In the alternative, this Court could summarily remand this case for reconsideration in light of this Court's opinion in the *Huddleston* case, cited supra.

SECOND QUESTION PRESENTED FOR REVIEW

Whether the use of videotaped depositions in a criminal trial violate the defendant's Sixth Amendment constitutional right to confront and cross examine the witnesses against him when the government fails to establish that the witnesses are unavailable for trial and when the government fails to establish compliance with Federal Criminal Rule of Procedure 15?

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the constitutional right to confront the witnesses against him or her. Consistent with the constitutional mandate, the Federal Criminal Rules have established strict standards for the use of testimony by way of a deposition instead of "live" testimony. See Federal Criminal Rule 15. (Appendix p. 00). The trial court, without conducting a hearing, summarily permitted the use of the depositions at trial without any showing by the prosecution that the witnesses were unavailable and permitted their use despite the prosecution's failure to comply with Federal Criminal Rule 15.

The depositions of nine witnesses were taken. Of the nine witnesses, six were alleged victims upon which specific counts of the indictment were related. Three of the witnesses were not named in the indictment. The prosecution, also without notice or court order, took the depositions of two additional witnesses, a Mrs. Crabree and a James Vest. The trial court refused to permit the use of the two depositions that the court did not authorize. The trial court, over objection, permitted the use of the other videotaped depositions including the testimony of Mrs. Gammon.

Defense counsel, at the time of the taking of the deposition, had specifically noted that the defendant was not waiving any of the requirements of the form of the deposition with respect to formality and authentication.

The record is clear that *none* of the witnesses reviewed or signed or in any way authenticated the depositions for purposes of accuracy. The parties, specifically the defendant, did not waive the mandatory requirement that the witnesses read and sign the transcribed deposition. The trial court's order did not specify or authorize videotape depositions. There also was absolutely no showing at the time of trial that the witnesses were unavailable to testify live. The trial court, in permitting the use of the depositions, noted the following:

> "...I am deeply concerned that the witnesses should be given the opportunity to review whether it is accurately recorded...
>
> * * *

> I do want to express to you that I have a deep concern about receiving a witnesses' testimony that has not been verified by a witness.
>
> * * *
>
> I'm doing this on the basis of Criminal Rule 2 and the representations of the United States that this is a proper procedure, and I admonish the United States that this will never happen with this judge again."

The rules governing the taking of depositions in criminal cases are explicit and clear. Fed. Crim. R.15(a)(d)(e) and (f) verbatim provides the following:

> (a) WHEN TAKEN. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may, upon motion of such party and notice to the parties, order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place...
>
> (d) HOW TAKEN. Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules,...
>
> (e) USE. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with his deposition.
>
> (f) OBJECTIONS TO DEPOSITION TESTIMONY. Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition.

Fed. Crim. R. 15(d) provides the "deposition shall be taken and filed in the manner provided in civil action". Therefore, this portion of Crim. R. 15 incorporates Fed. Civil R. 30. Fed. Civil R. 30(b)(4) and (e) verbatim state the following:

> (b)(4) The parties may stipulate in writing or the court may upon Motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at his own expense.
>
> (e) Submission to Witness; Changes; Signing. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, *unless such examination and reading are waived by the witness and by the parties.* Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. (Emphasis added).

The committee comments to Crim. R. 15 outline the important policy considerations involved in the use of depositions in criminal cases.

> It was contemplated that in criminal cases, depositions would be used only in exceptional situations, as has been the practice heretofore.
>
> *The Committee does not want to encourage the use of depositions at trial especially in view of the important of having live testimony from a witness on the witness stand.*
>
> The Committee believes that Rule 15 will not encourage trials by deposition. A deposition may be taken only in "ex-

ceptional circumstances" when it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved... *"A deposition, once it is taken, is not automatically admissible at trial, however. It may only be used at trial if the witness is unavailable and the rule narrowly defines unavailability.* The procedure established in Rule 15 is similar to the procedure established by the Organized Crime Control Act of 1980 for the taking and use of depositions in organized crime cases. (Emphasis added).

Federal Rule 804(4) verbatim provides:

"Unavailability as a witness" includes situations in which the declarant: '

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity.

The Court of Appeals in this case found that the prosecution failed to comply with rules concerning authentication and failed to demonstrate the witnesses unavailability but ruled that the error was harmless. The ruling of the Court of Appeals conflicts with the decisions of several other circuit courts of appeal.

In *United States v. Mann* 590 F.2d 361 (1978 1st Cir.), the Court of Appeals for the First Circuit reversed the conviction of an accused on the basis that the government failed to demonstrate that the witness was unavailable *at the time of trial.* The Court in *Mann* stated in regard to Crim. R.15 that "the language of the rule (exceptional circumstances) is not broad and should be exercised carefully". The Court, at p. 365, also noted that "allowing depositions too freely would create risks that parties... would try to use depositions in lieu of ive testimony at trial in contravention of the spirit of the Sixth Amendment." The Court, therefore, required strict compliance with Rule 15 and because the government had not made a diligent showing that the witness was unavailable for trial, reversed the defendant's conviction.

In *United States v. Acosta* 769 F.2d 721 (1985), the Eleventh Circuit Court of Appeals ruled that the burden of proving the

unavailability of a witness for medical reasons rests with the proponent of the deposition. In *Acosta,* a claim was made that the witness was unable to testify because of her illness. The Court in holding that a mere claim of illness was insufficient to meet the burden of demonstrating unavailability stated:

> Accordingly, the determination as to the "unavailability" of a witness, whose prior testimony is sought to be introduced into evidence is also the responsibility of the trial judge, *Howard v. Sigler,* 454 F.2d 115 (8th Cir. 1972), subject to the same standards of review.
>
> * * *
>
> Nor was there medical testimony as to the nature or severity of the child's illness.

In *Peterson v. United States* 344 F.2d 419 (1965), the Fifth Circuit in reversing a conviction where prior testimony was permitted into evidence on a claim that the witness was ill, stated the following:

> In criminal prosecutions, according to the weight of authority, the mere temporary illness or disability of a witness is not sufficient to justify the reception of his former testimony; it must appear that the witness is in such a state, either mentally or physically, that in reasonable probability he will never be able to attend the trial.

In each of these decisions, *Mann, Peterson,* and *Acosta,* the Court ruled that the error was prejudicial and ruled that the Sixth Amendment mandated strict compliance with rules governing the use of deposition testimony.

This Court should grant this writ in order to resolve the conflict within the Circuit Courts of Appeal in order to establish a uniform test for the admissibility of deposition testimony. This Court recently reiterated the importance of the Sixth Amendment right of confrontation in *Coy v. Iowa,* ___ U.S. ___, 108 S.Ct. 60 (1988). The same fundamental policy considerations are applicable here. Dr. Campbell had the constitutional right to have the witnesses testify "live" at trial in front of the jury. The prosecution failed to establish any reason

under the rules justifying their absence. This Court should, therefore, grant this petition.

THIRD QUESTION PRESENTED FOR REVIEW

Does the Fourteenth Amendment constitutional due process right to a fair trial limit the admissibility of evidence extrinsic to the indictment when the evidence is purportedly offered pursuant to Federal Rule of Evidence 404(b)?

An accused has a Fourteenth Amendment constitutional due process right to a fair trial. This includes the right to a trial untainted by evidence unrelated to and irrelevant to any charge in the indictment. See *Huddleston v. United States*, ___ U.S. ___, 108 S.Ct.226 (1988). The prosecution is not permitted to introduce evidence to show that a defendant accused is of "bad character" or guilty of "other acts" and, therefore, must be guilty of the charges in the indictment. Due process demands that the prosecution introduce only relevant and material evidence related to the indictment.

This Court should resolve the tension between Federal Rule of Evidence 404(b) and an accused's Fourteenth Amendment constitutional due process right to a fair trial. Federal Rule of Evidence 404(b) cannot supersede a criminal defendant's constitutional guarantee to a fair trial.

In this case, the testimony of Mrs. Gammon and Mrs. Newton, extrinsic to the indictment, improperly allowed the jury to infer that the petitioner was guilty because of his "bad character" or "bad acts". This deprived the petitioner his right to a fair trial. Judge Martin, Jr., in the dissent in this case, noted the following:

> The extrinsic offense evidence admitted here for the alleged purpose of showing intent is nothing more than an elaborate cloak behind which bad character evidence may be slyly admitted. The evidence admitted here in the name of intent is relevant only to the extent that it creates an inference that the defendant has a propensity for defrauding and mistreating patients. It does not have any indepdent relevance on the question of the defendant's intent. The

> danger that has manifested itself here is one inherent in most bootstrapping efforts. By looking to extrinsic offenses, prosecutors will be able to reinforce otherwise unprovable charged offenses by way of inferences generated from acts themselves not provable.
>
> We must be vigilant in our watch over the values secured by Rule 404(b), which assures criminal defendants that they will be fairly tried on the basis of their actions alleged in the indictment. Due process demands no less.

This Court should grant this petition, and determine on the merits a uniform standard applicable when an accused's constitutional due process guarantee to a fair trial conflicts with Federal Rule of Evidence 404(b).

FOURTH QUESTION PRESENTED FOR REVIEW

> *Whether, under the analysis of McNally v. United States, 483 U.S. ___, Congress intended the "mail fraud" statute to apply to the prosecution of a physician who administers a recognized form of treatment for a patient's medical condition?*

In *McNally v. United States,* 483 U.S. ___, 107 S.Ct. 2875, 97 L.Ed.2d 292, (1987) this Court restricted the application of the mail fraud statute, 18 U.S.C. §1341. This Court, in reviewing the legislative history of the statute, noted the following:

> The sponsor of the recodification stated, in apparent reference to the anti-fraud provision, that measures were needed "to prevent the frauds which are mostly gotten up in the large cities... by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country." Insofar as the sparse legislative history reveals anything, it indicates that the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money and property.
>
> * * *
>
> As the Court long ago stated, however, the words "to defraud" commonly refer to "wrongdoing one in his property

rights by dishonest methods or schemes", and "usually signify the deprivation of something of value by trick, deceit, chicane or overreaching." *Hammerschmidt v. United States* 265 U.S. 182, 188 68 L.Ed 968, 44 S.Ct. 511 (1924).

483 U.S. ___, 97 L.Ed. 300-302.

A review of the facts in this case establish that Dr. Campbell's conduct does not fall within the purview of the "mail fraud" statute or the "false claim" statute. In this case, the prosecution utilized the two statutes to impose upon a physician the "government's" choice of medical procedure. In effect, the government used these statutes to second guess medical judgment and to impose the method of treatment deemed proper by the government's expert. The government should not be permitted to utilize criminal statutes to interfere with a physican/patient relationship and determine what mode of treatment is appropriate and necessary. Congress certainly did not intend that the mail fraud statute be utilized to impose the federal government's will on physicians who, in the exercise of their own sound medical judgment, treat a patient with a recognized and effective form of treatment. If this Court does not overturn these convictions, physicians will be placed in the untenable position of either refusing to treat medicare patients or by only treating with the most conservative form of treatment regardless of the patient's individual medical needs. The federal government should not be allowed to dictate what medical procedure is appropriate and necessary with respect to a physician's Medicare cases. This case *does not* involve a case where no laser procedure was performed. The evidence overwhelmingly establishes that the procedures were done. The government's case boils down to the fact that the government felt that medication should have been utilized instead of the laser treatment, and that consents should have been obtained from the patients for a *non-invasive* laser procedure.

If Petitioner's conduct in initially utilizing laser treatment rather than medication is criminal, then Dr. Weber, the government's expert, could be subject to prosecution for engaging in the national multi-center study. Dr. Weber is currently treating some patients with elevated eye pressure with initial

laser treatment rather than medication. Dr. Weber did obtain consents from these patients. However, the failure to obtain a consent or the utilization of the laser rather than medication might constitute malpractice, or constitute judgment contrary to the major body of medical opinion, but it certainly does not constitute criminal conduct. If such conduct is held criminal, the "chilling effect" on physicians who treat Medicare patients will be obvious.

The *McNally* case, supra, outlines the conduct prohibited by the mail fraud statute. The statute was intended to prevent "frauds by thieves, forgers, and [those] with a purpose of deceiving and fleecing innocent people...by trick or deceit." *McNally v. U.S.*, 483 U.S. ___, 91 L.Ed.2d 292 at 300-301 (1987). The *false* claims statute requires that the claim be in fact false. The conduct of Dr. Campbell does not fall within the purview of either statute. The procedures were, in fact, done. There was no deceit, fraud or dishonest scheme. The issue of choice of initial treatment for elevated eye pressure is a matter of sound medical judgment. Sound medical judgment dictates that each patient be treated as an individual. Differences in medical opinion as to the form of initial treatment does not constitute a crime. This court should not give an expanded "harsher" interpretation to the mail fraud statute than the one Congress intended. This case may involve malpractice, or the exercise of medical judgment contrary to what is practiced by most physicians, but such conduct does not fall within the purview of the statutes.

This Court should grant this petition and permit full briefing on the merits of this important issue.

CONCLUSION AND REQUEST FOR RELIEF

First Question:

The trial court improperly permitted irrelevant and immaterial evidence of "other acts" to be introduced at trial. The jury was improperly permitted to infer that the petitioner was guilty because of his "bad character". The Court of Appeals for the Sixth Circuit did not apply the test established for the admissibility of such evidence by this Court in *Huddleston v.*

United States, ___ U.S. ___, 108 S.Ct. 226 (1988). *Huddleston* was decided three weeks after the Sixth Circuit ruled on the Petitioner's case.

The dissent in the Sixth Circuit case applied the proper test in determining the admissibility of the "other acts" evidence. An application of the *Huddleston* test to the facts of this case mandate the reversal of the Petitioners' conviction.

This Court should grant Certiorari on this issue, or summarily reverse and remand the case to the Sixth Circuit for review of this issue in light of *Huddleston,* cited supra.

Second Question:

Testimony was introduced at Petitioners' trial by way of videotaped depositions. The testimony was not authorized by court order, was not authenticated, and the prosecution failed to demonstrate in any way that the witnesses were "unavailable for trial" as mandated by Federal Criminal Rule 15. The Petitioners' Sixth Amendment right of confrontation was denied by the use of videotaped testimony that was procured and utilized in violation of the constitutional safeguards built into Federal Criminal Rule 15. This Court should, therefore, grant the petition and permit full briefing on the merits of this issue.

Third Question:

This Court has never decided whether the constitutional issue of whether or not an accused's right to a fair trial supercedes the provisions of Federal Rule of Evidence 404(b). This Court should grant the petition and also permit full briefing on this issue.

Fourth Question:

The prosecution utilized the mail fraud statute to prosecute a physician because the government unilaterally determined that medication should always be used as an initial form of treatment for glaucoma. Legitimate differences of opinion exist as to whether a physician should initially utilize medication or laser treatment in order to treat glaucoma. Each patient must be

treated as an individual. This Court, in *McNally,* cited supra, limited the use of the mail fraud statute. The prosecution in this case has extended the statute far beyond the purpose intended by Congress. The federal government should not be permitted to dictate a physician's mode of treatment where legitimate differences of medical opinion exist. This Court should grant the writ and decide this issue on the merits.

WHEREFORE, Petitioners request this Court grant the *Petition for Certiorari* and allow this case to be more fully briefed on the merits. In the alternative, Petitioners request that the petitioners case be summarily reversed and remanded in light of the Court's decision in *Huddleston v. United States,* supra.

Respectfully submitted,

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By: _____
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CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of this Court, I, Thomas M. Tyack, a member of the bar of this Court, hereby certify that on this 22nd day of July, 1988, three copies of the foregoing Brief for the Petitioner were mailed, first class postage paid, to the Assistant U.S. Attorney, Ann Marie Tracey, 220 Post Office & Courthouse Building, Cincinnati, Ohio 45202, and all parties required to be served pursuant to Supreme Court Rule 28.5.

THOMAS M. TYACK & ASSOCIATES CO., L.P.A.

By: _____
THOMAS M. TYACK
Counsel for Petitioner

APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 87-3466

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DOYLE E. CAMPBELL, DOYLE E. CAMPBELL, M.D., INC., an Ohio corporation,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed April 12, 1988

Before: MARTIN, GUY, and BOGGS, Circuit Judges.

GUY, Circuit Judge, delivered the opinion of the court, in which BOGGS, Circuit Judge, joined. MARTIN, Circuit Judge, (pp. 20-23) delivered a separate dissenting opinion.

GUY, Circuit Judge. On November 20, 1986, Dr. Doyle E. Campbell and his corporate alter-ego, Dr. Doyle E. Campbell, M.D., Inc., were charged in a multi-count indictment alleging that Dr. Campbell had billed for treatments he either did not perform or were unnecessary. Counts 1 through 45 charged each defendant with mail fraud, in violation of 18 U.S.C. § 1341, based on checks received by Dr. Campbell

from Nationwide Insurance Company. Counts 46 through 72 charged each defendant with filing false claims against the United States government, in violation of 18 U.S.C. § 287, based on claims submitted by Dr. Campbell. The indictment also alleged that the defendants had aided and abetted each other with respect to each individual count, in violation of 18 U.S.C. § 2. The defendants pled not guilty and were tried before a jury in federal court. The 72 counts of aiding and abetting were dismissed by the trial judge at the close of the government's case. Of the remaining 72 counts which went to the jury, the defendants were each found guilty of 34 mail fraud counts and 18 counts of false claims. In each case where the defendants were found guilty of submitting a false claim with respect to a particular patient, they were also convicted of the related count of mail fraud. Likewise, with respect to the 9 counts in which the defendants were found not guilty of filing false claims, they were also acquitted of the corresponding charge of mail fraud. Thus, of the 36 patients referred to in the indictment, the jury found defendants guilty of a total of 52 counts involving 25 patients and not guilty on 20 counts involving 11 patients.

On May 6, 1987, Dr. Campbell was sentenced to 14 months imprisonment on each count to run concurrent with each other and was fined $75,400. The corporate defendant received the same fine, with payment by either defendant to be credited against the other. For the following reasons, the defendants' convictions are affirmed.[1]

I.

Dr. Doyle E. Campbell, an ophthalmologist, established his practice in southern Ohio in 1971. Many of Dr. Campbell's patients are elderly people who qualify for federal medicare benefits and state medicaid benefits. The Health Care

[1]Both defendants are hereinafter referred to in the singular.

Financing Administration (HCFA), a division of the Department of Health and Human Services, has contracted with Nationwide Insurance Company to administer the medicare claims in Ohio. Under the existing financing system, a doctor who treats a medicare patient is required to submit a "Medicare Health Insurance Claim Form" (HCFA form 1500) to Nationwide which, on behalf of HCFA, pays for a portion of the claim. The doctor is required to certify that "the services shown on this form were medically indicated and necessary for the health of the patient and were personally rendered by me or were rendered incident to my professional service by my employees." This case arose as a result of claims filed by Dr. Campbell seeking reimbursement for laser treatments which he performed on several of his medicare patients. The claims ranged from $900 to $950 of which $530 to $680 were covered by the medicare program. The government alleged that Dr. Campbell billed medicare for several treatments which were either not performed or were not necessary.

Dr. Campbell purchased an Argon laser in 1983 to treat patients who suffer from glaucoma. Glaucoma is a medical condition generally defined as increased internal pressure within the eye which causes nerve damage and leads to gradual loss of sight. One of the government's expert witnesses, Dr. Zalta, testified that nerve damage and corresponding reduction in vision must be present in order to establish the existence of glaucoma. Dr. Zalta also stated that high internal eye pressure, or ocular hypertension, will not necessarily lead to nerve damage because the tolerance for internal ocular pressure varies among individuals. The expert for the defense, Dr. Andrew, agreed with Dr. Zalta's general description; however, he also noted that some doctors define glaucoma in a broad sense to encompass all cases of elevated internal eye pressure.

The laser can be used to treat glaucoma by placing small burns upon the trabecular meshwork which is the "drain"

in the eye that permits fluids to leave the eye. This treatment is referred to as Argon Laser Trabeculoplasty (ALT). Initially, when the ALT procedure first became widely available, doctors were advised to administer 100 burns over a 360-degree radius of the eye at a maximum power setting of 1,000 milliwatts. Subsequent studies showed that effective results could be achieved with 40 to 100 burns at 600 to 1,000 milliwatts. All the expert witnesses, including the defense witness, Dr. Andrew, testified that these ranges represented the current standards of medical treatment. The doctors also agreed that glaucoma patients should be treated first with medications and eyedrops and that laser treatment should only be used if the maximum tolerated medicinal therapy proved ineffective. Defendant, however, cited a recent experimental study in which laser treatments are being used as an initial form of treatment. Dr. Weber, who appeared as an expert witness for the government, is currently participating in this study which will not be completed until 1989 at the earliest.

Dr. Campbell testified that he generally made 15 to 25 burns using a power setting of 300 milliwatts. His assistants testifed that in most cases, Dr. Campbell only made 5 to 10 burns. Many of the patients testified that they received 5 or less "shots" based on the number of flashes and the distinctive "clicking" noise made by the machine when the laser was activated. Moreover, several of the patients testified that Dr. Campbell did not place a "gonioscopic lens" over their eye before the treatment. All the experts agreed that the use of such a lens was essential to effective laser treatment.

Defendant raises the following issues on appeal. First, defendant contends that the district court erred by allowing the government to present videotaped deposition testimony where the government had failed to establish that these witnesses were unavailable at the time of trial and that the depositions had been authenticated by the deponents. Second, defendant argues that the government should not have been allowed to call on two witnesses who were not mentioned

in the indictment. The third argument relates to the admission of certain physical evidence including a check stub showing the cost of the ALT machine and a chart summarizing the patients' individual records. Finally, Dr. Campbell argues that he cannot be convicted of mail fraud and making false claims where he administered a recognized form of treatment for a patient's medical condition. We address these issues *seriatim*.

II.

Dr. Campbell objects to the admission of the videotaped deposition testimony on several grounds.

A. Unavailability

Defendant argues that the court erred in failing to require the government to show that the witnesses were unavailable to testify *at the time of trial*. On February 4, 1987, the government filed a motion to take the depositions of several elderly witnesses whose health-related problems prevented them from traveling to Cincinnati. The defendant did not object to the motion. In granting the government's motion, the district court stated:

> Federal Rule of Criminal Procedure 15 provides that upon a showing of "exceptional circumstances" and "in the interest of justice," the Court may order the taking of testimony of prospective witnesses by deposition. This Court concludes that such exceptional circumstances have been shown in this case. It has been shown that the witnesses in question are all Medicare beneficiaries upon whom the defendant is alleged to have performed the Argon laser trabeculoplasty; also, it has been shown that these witnesses have severe difficulties which may prevent their testimony at the trial of this matter.

On February 20, 1987, the United States moved pursuant to Rule 15 of the Federal Rules of Criminal Procedure to

use the depositions of several witnesses at trial based on the witnesses' unavailability under Rule 804(a) of the Federal Rules of Evidence. Defense counsel objected to the use of the depositions at trial, and after lengthy argument, the objection was overruled.

Rule 15(a) and (e) of the Federal Rules of Criminal Procedure provides in part:

> **(a) When Taken.** Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties, order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. . . .
>
> . . . .
>
> **(e) Use.** At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence . . . .

Fed. R. Crim. P. 15(a) and (e).

Federal Rule of Evidence 804(a) provides in part:

> **(a) Definition of Unavailability** - "Unavailability as a witness" includes situations in which the declarant -
>
> . . . .
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity . . . .

Fed. R. Evid. 804(a)(4).

It is well established that the infirmity of an elderly witness which prevents him or her from traveling is an "exceptional circumstance" which justifies the use of deposition testimony at trial. *United States v. Keithan,* 751 F.2d 9 (1st Cir. 1984). The determination of admissibility of deposition testimony based on the unavailability of the witness is a matter left to the discretion of the trial judge. *United States v. Acosta,* 769 F.2d 721 (11th Cir. 1985).

In the instant case, the judge made a specific determination that the witnesses were unable to travel to Cincinnati at the time he granted the government's motion to take the depositions on February 10, 1987. The trial commenced less than two weeks later. By admitting the depositions at trial, the district judge implicitly found that the exceptional circumstances which initially justified the taking of the depositions were still present since it was highly unlikely that an elderly invalid would undergo a miraculous rejuvenation during the two-week interval. Thus, we find that the district court did not abuse its discretion by admitting the deposition testimony without first conducting a special hearing to determine whether the witnesses were physically unable to appear in person at trial.

B. Authentication of Stenographic Depositions

Defendant also claims as error the court's admission into evidence of depositions that were not authenticated by the witnesses. Federal Rule of Criminal Procedure 15(d) states that "depositions shall be taken and filed in the manner provided in Civil Actions." Therefore, Rule 15 of the Federal Rules of Criminal Procedure incorporates Rule 30(e) of the Federal Rules of Civil Procedure which provides:

> **(e) Submission to Witness; Changes; Signing.** When the testimony is fully transcribed the deposition shall be submitted to the witness for examination

> and shall be read to or by the witness, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign.

In the instant case, it is undisputed that the deponents did not review and sign the transcripts of their testimony. Prior to the taking of the first deposition, defense counsel stated for the record that "the defendant on this deposition or any other does not waive any of the requirements of the form with regard to the formality or authentication." Thereafter, defense counsel never again raised the issue until the trial when he objected to the admission of the deposition into evidence. The assistant United States attorney admitted to the judge that she had been unaware of the signing requirement and she moved for a delay of trial to enable the government to retake the depositions. The district court expressed its concern with the government's failure to comply with the proper authentication procedures; nevertheless, the court overruled defendant's objection and allowed the deposition into evidence under Rule 2 of the Federal Rules of Criminal Procedure which provides:

> **Rule 2. Purpose and Construction**
>
> These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

On appeal, the government contends that the defendant waived any objection based on a lack of authentication

because defendant failed to file a motion to suppress under Rule 32(d)(4) which provides:

> **(4) As to Completion and Return of Deposition.** Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

Fed. R. Civ. P. 32(d)(4).

In support of its argument, the government cites to the Ninth Circuit decision in *United States v. Garcia,* 527 F.2d 473 (9th Cir. 1975), wherein the court held that defendant had waived his objection because he had not filed a motion to suppress as required by Rule 32(d)(4).

Regardless of whether or not defendant waived his objection in this case, we find that the admission of the unsigned depositions at most constitutes harmless error under Rule 52(a) of the Federal Rules of Criminal Procedure which states: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

First, we note that defendant has not cited any specific examples of possible inaccuracies in the deposition testimony. Nor has defendant demonstrated any prejudice which might have resulted from the failure of the deponents to review and sign the transcripts of their testimony. We note that defense counsel was present when the depositions were taken and therefore had an opportunity to point out any perceived irregularities or mistakes. Moreover, the depositions were videotaped and these tapes were shown to the jury at trial. The use of the videotapes is discussed in greater detail *infra,* but for purposes of the present issue, we note that the

use of videotapes eliminates the risk of error resulting from typographical mistakes which occasionally occur during the course of stenographic transcription. Finally, we note that the jury may have relied on the evidence presented in the tapes and, therefore, the deponents' failure to sign the stenographic transcripts would be only remotely relevant to the accuracy of the taped testimony. Thus, we conclude that the lack of authentication of the transcripts amounts to no more than harmless error and does not provide a basis for reversal. See *McVoy v. Cincinnati Union Terminal Co.*, 416 F.2d 853 (6th Cir. 1969).

C. Use of Videotaped Depositions

Defendant claims that the district court erred by allowing the presentation of the deposition testimony to the jury in a videotape format. Defendant bases his argument on Fed. R. Civ. P. 30(b)(4) which is incorporated by reference into Fed. R. Crim. P. 15(d). Rule 30(b)(4) provides in part:

> (4) The parties may stipulate in writing or the court may upon Motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at the party's own expense.

Fed. R. Civ. P. 30(b)(4).

Defendant argues that the court order granting the government's request to take deposition testimony did not expressly allow the government to videotape those depositions. The defendant also notes that he never stipulated to the videorecording of the depositions. Moreover, defendant once again

relies on the general statement of the defense counsel made at the outset of the depositions in which he states that defendant does not waive "any of the requirements of form with regard to formality and authentication." The assistant United States attorney was apparently caught off guard when defense counsel raised this objection at trial. The court declined her motion to have the videotaped format approved *nunc pro tunc*; nevertheless, the court overruled defendant's objection and allowed the tapes to be played before the jury.

We find that the government's failure to obtain special permission from the court to videotape the depositions constitutes no more than harmless error under Fed. R. Crim. P. 52(a). Once again, defendant has failed to demonstrate any prejudice resulting from the presentation of the deposition testimony in the videotape format as opposed to the traditional stenographic record. We also note that defense counsel was present at all the depositions and never objected to the recording by means of videotape. It appears that defense counsel was "sandbagging" on this argument, waiting to spring it on the government at trial. Moreover, the district court allowed the use of the tapes even though it had not expressly authorized the taping of the depositions in its previous order. A review of the transcript shows that defense counsel did not raise any legitimate objections to the presentation of the videotaped testimony other than that the government had failed to get prior approval from the court. Defendant raises the same argument on appeal and relies solely on the alleged violation of Fed. R. Civ. P. 30(b)(4).

Under these circumstances, we find that the government's alleged failure to comply with the technical requirements of Rule 30(b)(4) in obtaining the videotaped testimony of the deposition witnesses prior to trial and the district court's subsequent ruling allowing the government to show the tapes at trial amounts to no more than harmless error.

III.

Defendant contends that the trial court erred in admitting into evidence the testimony of two former patients of the defendant. Mary Newton testified that she was billed for a laser treatment which was never performed. According to Mrs. Newton, the bill was reduced by 50 percent after she complained to Dr. Campbell. The second witness was Jessie Marie Gammon, a former licensed practical nurse, who testified that defendant had told her that she had received laser treatment even though she saw no flashes. Neither Mrs. Newton nor Mrs. Gammon was mentioned in the indictment and defendant contends that their testimony was inadmissible under Federal Rule of Evidence 404(b), which provides:

> **(b) Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In *United States v. Vincent,* 681 F.2d 462 (6th Cir. 1982), this court set forth the analysis to be used when reviewing the admissibility of evidence under Rule 404(b):

> In reviewing the admission of evidence challenged under Rule 404(b), we must make two determinations. First, we must decide whether [the evidence] was admissible for any *proper* purpose, as distinct from the *improper* purpose of showing "character" or "propensity." If we conclude that there was a proper basis for admission, we must then consider whether the probative value of the evidence outweighed its potential prejudicial effects. In the second instance, the standard of review on appeal is whether the trial judge abused his discretion in admitting the evidence.

681 F.2d at 465 (emphasis in original) (citations omitted) (quoted in *United States v. Dabish,* 708 F.2d 240, 242 (6th Cir. 1983)).

Applying this two-step test, we find that the evidence was admissible for the purpose of showing "intent." The acts alleged were substantially similar and approximately concurrent with the offenses charged in the indictment. *See United States v. Largent,* 545 F.2d 1039 (6th Cir. 1976), *cert. denied,* 429 U.S. 1098 (1977). Moreover, the question of intent was clearly at issue since Dr. Campbell's primary defense was that he had acted in good faith, and both knowledge and intent are elements of those offenses under 18 U.S.C. §§ 287 and 1341. *See generally Dabish,* 708 F.2d 240 (similar acts are admissible to prove criminal intent).

We also find that the district court did not abuse its discretion in deciding that the probative value of the evidence outweighed its prejudicial effect. This evidence did not involve allegations of unrelated "bad acts" which might impugn the character of the defendant. Rather, the testimony of Mrs. Newton and Mrs. Gammon paralleled that of many of the victims who were referenced in the indictment and was directly relevant to the issue of whether the defendant had knowingly engaged in a scheme to defraud his patients and their insurers by charging for unnecessary treatments.

IV.

The defendant's claims of error with respect to the introduction of some of the physical evidence merits only brief discussion. Defendant claims that he was unduly prejudiced by the admission of two cancelled checks which showed that he paid over $50,000 for the laser machine. The government argues that this evidence is admissible to show motive since, under the government's theory of the case, defendant performed unnecessary and useless procedures in order to recoup the cost of the machine. We find that the trial judge

did not abuse his discretion in determining that the probative value outweighed the prejudicial effect.

Defendant also claims that the court erred by allowing the government to introduce a summary chart based on defendant's medical files. The chart was prepared by one of the government's expert witnesses, Dr. Zalta, who summarized the information which appeared in the files of the patients who were named in the indictment. Defendant first contends that the chart was misleading and inaccurate. This contention is without merit.

Defendant also argues that the chart was unnecessary and, therefore, inadmissible because the jury could have examined the individual files themseives.

Federal Rule of Evidence 1006 provides in part:

> [C]ontents of voluminous writings, recordings or photographs that cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation.

The Sixth Circuit, in *United States v. Scales,* 594 F.2d 558 (6th Cir.), *cert. denied,* 441 U.S. 946 (1979), recognized that summary charts are admissible not only under Rule 1006, but by the "established tradition" in the Sixth Circuit, and others, permitting introduction of summary evidence with a proper limiting instruction. 594 F.2d at 563. The records consisted of the files of 36 patients, containing a maximum of approximately 30 pages of information per patient. Without the chart, the jury would have been forced to review hundreds of pages of technical information which may not have been readily understandable to the lay reader. Moreover, the individual files were admitted into evidence and were available for examination by the jury if they so desired.

"The admission of summaries under Rule 1006 is committed to the sound discretion of the trial court." *Gomez v. Great Lakes Steel Division National Steel Corp.,* 803 F.2d 250, 257

(6th Cir. 1986); *United States v. Collins,* 596 F.2d 166, 169 (6th Cir. 1979). We find that the district court did not abuse its discretion in admitting the summary chart.

V.

Defendant contends that the acts alleged in the indictment do not constitute crimes under the false claim statute, 18 U.S.C. § 287, or the mail fraud statute, 18 U.S.C. § 1341. We disagree.

Title 18 U.S.C. § 287 provides:

> Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

18 U.S.C. § 287 (Supp. 1987).

In the instant case, defendant was charged with performing medical treatments that were unnecessary and inappropriate and then billing the government for the procedures. The medicare claim forms expressly required the doctor to certify that "the services shown on this form were medically indicated and necessary for the health of the patient." Thus, where a physician submits a medicare claim to the government through an insurer, and the physician knows that the treatments performed were unnecessary or non-therapeutic, he or she is criminally liable under section 287. *See United States v. Catena,* 500 F.2d 1319 (3d Cir.), *cert. denied,* 419 U.S. 1047 (1974).

The mail fraud statute is contained in 18 U.S.C. § 1341 which provides in part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, . . . any such matter or thing, [shall be punished according to law] . . . .

In *United States v. Talbott,* 590 F.2d 192, 195 (6th Cir. 1978), this court described the offense of mail fraud under section 1341:

> The elements of the offense of mail fraud under 18 U.S.C. (Supp. V) § 1341 are (1) a scheme to defraud, and (2) a mailing for the purpose of executing same. "It is not necessary that the scheme contemplate the use of the mails as an essential element." *Pereira v. United States,* 347 U.S. 1, 8, 74 S.Ct. 358, 362, 98 L.Ed. 435 (1954). See also *United States v. Schilling,* 561 F.2d 659 (6th Cir. 1977). Nor is it required that the false representations themselves were transmitted by mail. "It is sufficient that the use of the mails was caused by the defendant in furtherance of the fraudulent scheme." *United States v. Hopkins,* 357 F.2d 14, 17 (6th Cir.) *cert. den.* 385 U.S. 858, 87 S.Ct. 107, 17 L.Ed.2d 84 (1966).
>
> "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then

> he 'causes' the mails to be used." *Pereira v. United States, supra,* 347 U.S. at 8-9, 74 S.Ct. at 363. See also *United States v. Street,* 529 F.2d 226 (6th Cir. 1976). "That the confirmation letters and mailed check could have been hand-delivered or delivered otherwise than through the mails, is immaterial." *United States v. Stull,* 521 F.2d 687, 689 (6th Cir. 1975) *cert. den.* 423 U.S. 1059, 96 S.Ct. 794, 46 L.Ed.2d 649 (1976).

In *Talbott,* this court upheld the mail fraud convictions of two dentists who were charged with having billed a joint state and Federal Medicaid Program for dental examinations, services and treatments that were medically unnecessary or, if not, were performed unprofessionally and without regard for the patients' well being. Like Dr. Campbell, the defendants in *Talbott* argued that their conduct was at worst tortious malpractice and could not support a criminal conviction. This court rejected that argument and held that the defendants could lawfully be prosecuted for "wilfully devising a scheme or artifice to defraud [the government] through knowing misrepresentation of the type and nature of the treatments involved and the carrying out of such scheme by use of the mails in delivering the false billings." 590 F.2d at 195.

Dr. Campbell seeks support for his position from the Supreme Court's recent decision in *McNally v. United States,* 483 U.S. - , 107 S. Ct. 2875 (1987). In *McNally,* the Court limited the scope of the mail fraud statute by overturning the conviction of a defendant who was accused of barring deprived citizens through a fraudulent scheme involving the mails of their right to "good government." Unlike the "intangible rights" involved in *McNally,* Dr. Campbell's conviction is based on a fraudulent scheme to obtain *money* from his patients and the government. This type of conduct is clearly within the traditional parameters of the offense described in section 1341.

VI.

Finally, we consider the issue of whether there was sufficient evidence to support the defendant's convictions under sections 287 and 1341. The determinative issue is whether the defendant acted with fraudulent intent which is a common element to both offenses. Our standard of review is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979) (emphasis in original).

In the instant case, the government's expert witness, Dr. Zalta, testified that the conmonly accepted definition of glaucoma involves actual nerve damage and partial loss of vision resulting from increased internal eye pressure. Dr. Zalta stated that increased eye pressure or ocular hypertension leads to vision loss in a relatively small percentage of cases. Therefore, according to Dr. Zalta, the current standard of medical practice calls for doctors to refrain from administering the available glaucoma treatment until the patient has suffered some loss of vision.

Once the patient has been diagnosed as having glaucoma, Dr. Zalta testified that a three-step process is used to treat the ailment. First, the patient is treated with eye drops or medication which is effective in 90 to 95 percent of the cases, although it may also result in some minor side effects. If the medications fail to reduce the internal pressure, the next step would be to administer laser treatment. Finally, if all other forms of treatment proved ineffective, the doctor might attempt to reduce the internal eye pressure through conventional surgery. Dr. Zalta reviewed the records of the patients named in the indictment and testified that 27 of the 36 patients were not suffering from glaucoma at the time defendant administered the laser treatment. In addition, Dr. Zalta testified that 18 of the patients had not received any medica-

tions prior to the laser treatment, and none of the remaining patients were on maximum tolerated medical therapy. In other words, the potential for successful treatment with medications had not been exhausted prior to the laser treatment.

The government also introduced evidence showing that the treatments administered by the defendant could not have been effective. All the expert witnesses testified that the current standard called for 40 to 100 burns at between 600 and 1,000 milliwatts. Defendant testified that he only performed 15 to 25 burns at 300 milliwatts. Defendant's assistants and patients testified that he only made 5 to 10 burns. Moreover, several patients testified that the defendant did not fit them with a gonioscopic lens which all the experts agreed was essential to the proper administration of the laser treatment. Based on this evidence, the jury could have inferred that the defendant intentionally used a small number of shots at a lower power setting because he knew the treatments were unnecessary and he did not want to risk the chance of permanent injury which is an inherent risk in the laser treatments.

When the evidence presented at trial is viewed most favorably to the government, we find that a rational trier of fact could have concluded that the doctor was not merely performing an experimental procedure, but rather knowingly administering unnecessary and ineffective treatments for which he then billed the government.

For the foregoing reasons, the defendant's conviction is **AFFIRMED**.

BOYCE F. MARTIN, JR., Circuit Judge, dissenting. I write separately to voice my disagreement with the majority's conclusions drawn in section III of its analysis. Specifically, I believe that the trial court erred when it admitted into evidence the testimony of two former patients of the defendant, two patients who were not listed in the indictment as defrauded by the defendant.

While I agree with the majority's reliance upon *United States v. Vincent*, 681 F.2d 462 (6th Cir. 1982), where this court established the analysis to be used when reviewing the admissibility of evidence under Rule 404(b), I disagree with the majority's application of that analysis. Rule 404(b) provides:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action and conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Fed. R. Evid. 404(b).

I do not see how the testimony of Mary Newton or Jessie Gammon can be admitted within the requirements of Rule 404(b). Mrs. Newton, who was not listed in the indictment as having been defrauded, testified at trial that the defendant did not perform any laser treatments on her and that the first time she knew she had received a laser treatment was when she received a $900 bill in the mail. She also testified that she complained about the bill and that the defendant then cut the bill in one-half. This testimony has no relevance to the question of whether the defendant possessed the intent necessary to be convicted of defrauding Medicare and the individuals listed in the indictment. It appears clear that the purpose of this testimony was to introduce evidence from

which the jury could infer that the defendant was guilty of bad acts.

Mrs. Gammon, a second patient of the defendant not listed in the indictment, testified to the effect that the defendant did not use a "gonio lens" which is necessary to perform laser treatments. She was the only patient to allege that no lens was used. She was also allowed to testify that when she requested her charts from the defendant they could not be found and that she never did receive her medical records from the defendant. She was the only patient to testify that she could not obtain her records. Like the testimony of Mrs. Newton, this testimony has no relevance to the counts charged in the indictment. Because of the importance of the testimony of these two witnesses, owing to its uniqueness and dissimilarity from the other evidence in this case, I would find that the district court abused its discretion in admitting the extrinsic testimony of Gammon and Newton in contravention of Rule 404(b).

The majority indicates that it believes that the evidence is admissible for the purpose of showing "intent." The trial court indicated, at pages 297 and 298 of the transcript, that it was admitting the testimony of these two witnesses because it helped show "knowledge." It must be remembered, however, that "intent" and "knowledge" should not be analyzed in a vacuum but with respect to the crimes alleged to have been committed by the defendant in the indictment. The indictment indicates the identity of the defendant's patients alleged to have been defrauded and how the defendant, as part of that scheme, also defrauded the Department of Health and Human Services. Nowhere in the indictment is Mary Newton or Jessie Gammon identified. Thus, even if the defendant intended to defraud Newton and Gammon, I do not see how this is relevant to the government's allegations that the doctor intentionally defrauded Medicare and those patients identified in the indictment. The role that Newton's and Gammon's testimony played in convicting defendant

cannot be minimized. In a colloquy with the trial court, government's attorney admitted that Newton's testimony was critical because she was "the only witness . . . that can testify that she personally was defrauded of money because she had to pay the bill herself." Indeed, Mrs. Newton was not a Medicare patient and was the only patient who testified that no surgical procedure was performed. All the patients listed in the indictment were Medicare patients and none of them testified that no laser procedure was performed. I believe the testimony of Mrs. Newton had nothing to do with the other counts in the indictment, and that it was, undoubtedly, highly prejudicial.

The wrongs committed by the defendant with respect to these two witnesses do not relate in any way to the charges made against the defendant in the indictment, except perhaps to indicate that a defendant who would perform these acts may be presumed to have intentionally defrauded the defendants in the indictment. The problem with this, of course, is that the introduction of evidence of a person's character for the purpose of proving "action and conformity therewith" is prohibited. Fed. R. Evid. 404(b). Just as a defendant charged with robbing Bank A may not have admitted against him evidence that he may have attempted to rob Bank B, I believe the defendant in this case should not have had introduced against him evidence that he may have defrauded patients not listed in the indictment.

The extrinsic offense evidence admitted here for the alleged purpose of showing intent is nothing more than an elaborate cloak behind which bad character evidence may be slyly admitted. The evidence admitted here in the name of intent is relevant only to the extent that it creates an inference that the defendant has a propensity for defrauding and mistreating patients. It does not have any independent relevance on the question of the defendant's intent. The danger that has manifested itself here is one inherent in most bootstrapping efforts. By looking to extrinsic offenses, prosecutors will be

able to reinforce otherwise umprovable charged offenses by way of inferences generated from acts themselves not provable.

We must be vigilant in our watch over the values secured by Rule 404(b), which assures that criminal defendants will be fairly tried on the basis of their actions alleged in the indictment. Due process demands no less.

Accordingly, I must respectfully dissent.

18 U.S.C. §1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises,... for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon,... any such matter or thing, [shall be punished according to law]....

18 U.S.C. §287

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

FEDERAL RULE OF EVIDENCE 404

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action and conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

FEDERAL CRIMINAL RULE OF PROCEDURE 15

(a) WHEN TAKEN. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may, upon motion of such party and notice to the parties, order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place....

(d) HOW TAKEN. Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules,....

(e) USE. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with his deposition.

(f) OBJECTIONS TO DEPOSITION TESTIMONY. Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compusory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL RULE OF EVIDENCE 804(a)(4)

"Unavailability as a witness" includes situations in which the declarant:
(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity.

FEDERAL RULE OF CIVIL PROCEDURE 30

(b)(4) The parties may stipulate in writing or the court may upon Motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at his own expense.

(e) Submission to Witness; Changes; Signing. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, *unless such examination and reading are waived by the witness and by the parties.* Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. (Emphasis added.)